NO. 88-1921

FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

October Term, 1988

FRANK MORGAN,

Petitioner,

versus

DENNIS WHITT, individually and in his official capacity, AND THE TOWN OF LAKE PARK, FLORIDA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Is a Defamatory and Intrusive Investigation of a Private Citizen Conducted by a Town Manager, and a Police Officer Under his Command, Performed "Under Color Of" Law?

II. Does Application of First Amendment "De Novo" Review Permit an Appellate Court to Substitute its Own Credibility Calls and Subsidiary Factfindings for Those Made by a Reasonable Jury, and Does De Novo Review Apply at all Where the Jury's Finding Supports the Norm of Free Political Speech?

III. Does a Citizen who Writes Newspaper Articles Criticizing Government Thereby Become a "General Purpose Public Figure" Open to a Government Official's Retaliation With Lies and False Rumors Regarding the Citizen's Past Personal Life?

IV. Is a Town Manager, who is the Town's Chief Administrative Officer and Chief Law Enforcement Officer, a Policymaker for Purposes of 42 U.S.C. §1983?

PARTIES TO THE PROCEEDING BELOW

All parties to the proceeding immediately below are contained in the caption. Claims against a defendant in the original action, James Tice, were dismissed.

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CITATION TO OPINION BELOW

Morgan v. Tice, 862 F.2d 1495 (11th Cir. 1989).

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Eleventh Circuit reversed the jury verdict and dictrict court judgment on January 11, 1989, see Morgan v. Tice, 862 F.2d 1495 (11th Cir. 1989) (hereinafter cited "Appendix [App.]" 3).

Morgan's petition for rehearing and suggestion for rehearing en banc was denied, and the denial was filed on February 27, 1989. App. 1.

This Court has jurisdiction to grant certiorari in this case pursuant to 28 U.S.C. § 1254(1) and Sup. Ct. Rule 17.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I:

Congress shall make no law . . . abridging the the freedom of speech, or of the press. . . .

U.S. Const. amend. VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioner Frank Morgan moved to the Town of Lake Park, Florida, in 1978 from Pennsylvania. App. 3, 7. In March 1982, Morgan first met Respondent Dennis Whitt, who was then the Town Manager, chief administrative officer, and chief law enforcement officer for Respondent Lake Park. App. 6, 8; Record, Vol. 5, at 34-35 [R5/34-35].

In Lake Park, Morgan criticized various members of the Town Commission and Whitt's performance as Town Manager. The criticisms were delivered both verbally and in a column Morgan wrote in a local weekly newspaper. App. 6.

In 1985, as a direct result of Morgan's newspaper criticism, Whitt decided to travel to Schwenksville, Pennsylvania to investigate Morgan's past, R5/47. This trip was scheduled in conjunction

with a trip to Auburn, New York, where Whitt was investigating the educational background of a Town employee.[1] App. 8-9. It is undisputed that the stop in Pennsylvania added some $400.00 to the airfare, which was paid for by the Town. App. 9-10; R7/505-06.

Before taking the trip, Whitt telephoned the Mayor of Schwenksville, identified himself as the Town Manager of Lake Park, and stated he was looking for background information concerning Morgan, possibly leading to a criminal investigation, R6/295-96. Whitt also placed a call, paid for by the Town, to

1. The rationale offered for the trip to New York was Whitt's need to investigate the truth of a Lake Park Police Department employee's claim that she was a high school graduate, App. 12-13. Lake Park Police Sergeant Tice, noted that verification of the employee's high school graduation could have been obtained by a simple telephone call or letter, R5/94-96, R6/184-86.

the Chairperson of the Schwenksville Town Council, R5/67, R7/503.

Sergeant James Tice of the Lake Park Police Department traveled with Whitt; Tice testified that he accompanied Whitt because he believed he could be disciplined if he refused, R5/102. Tice also testified that Whitt told him the Town Commission knew about the trip, and that Whitt directed him to show his police identification while in Pennsylvania, telling him "that's why I brought you along, because people tell you more when they see I.D." R5/99, 103.

Whitt testified that he went to Pennsylvania "to retrieve information about Mr. Morgan" and that the Town Commission was aware that he was going there for the purpose of inquiring into Morgan's background. R5/47-48.

Upon arriving in Schwenksville, Whitt and Tice went to a diner seeking directions to the Independent, a newspaper located near Schwenksville, R5/61. Two patrons of the diner gave them directions. One testified that a police badge was displayed, R6/251, while the other stated "they said they were police officers from Florida" and displayed identification. He added that "a trailer being burnt" was mentioned in connection with Whitt's questions about Morgan, R6/262, 264.

Whitt and Tice then went to the office of the Independent, where Whitt instructed Tice to identify himself as a police officer, R5/108. Whitt identified himself as the Town Manager of Lake Park, and Tice displayed his Lake Park police identification. App. 11; R5/62, 107.

Lynn Nyce, an employee at the Independent, testified that Whitt told her that "properties Mr. Morgan owned, had mysteriously burned . . . I believe you here call it Jewish Lightning; in Florida they call it arson." She also testified that Whitt called Morgan "a crook," and that he stated, "We're going to get enough information on him to put his ass in jail." App. 11 n.1. J. Howard Fenstermacher, also present at the Independent, stated that "One guy, I think he said was a detective. And the other guy was some official from the town in Florida," R6/235, and that "they indicated they were conducting an investigation into [Morgan's] background." R6/236.

Returning to Schwenksville, Whitt and Tice met with Schwenksville Police Chief Francis Kuhn -- Tice again used

his police identification and Whitt gave Kuhn a business card which identified him as Town Manager, R5/64 -- and then with Police Chief Kuhn, the Mayor of Schwenksville, the Chairperson of the Schwenksville Town Council, the editor of the Schwenksville Item, and the Schwenksville Public Works Director, R5/66-67. Whitt again gave out his business card, this time to the Mayor and the Public Works Director, R5/286, R6/299.

Clarence Grimley, the Public Works Director, stated that Whitt said that he would like to lock Morgan's ass up, R6/283. Mayor Schlick recalled that Whitt identified himself as Town Manager, R6/296, and that Tice identified himself as a Police Sergeant. R6/296. Bruce McBain, the editor of the Item, stated that Whitt had "question[ed] the

character" of Morgan, R6/407, and that he was left "with the impression that Morgan was in deep trouble." App. 12; R6/401.

Morgan subsequently learned of Whitt's trip to Pennsylvania and of the investigation. He testified to the jury in the instant case that he was frightened and had lost sleep, and that he stopped regularly writing his newspaper column because "it's not worth it. You don't know what's liable to happen. Why jeopardize my family and myself for this? I'm too old for it." R5/132, 133, 134, 149. Morgan also stated that he feared for his safety and worried that he might be killed or his home bombed. Id.

PROCEEDINGS BELOW

Petitioner Frank Morgan filed this suit on April 18, 1985, against the Town

of Lake Park, Florida, and its Town Manager, Dennis Whitt. R1/1.

Morgan alleged that Whitt had defamed him and had invaded his privacy with the intent to chill the exercise of his First Amendment rights and that these actions violated his civil rights under 42 U.S.C. §1983. He also alleged that Whitt was a policymaker for Lake Park who had carried out his plans to violate Morgan's rights as part of a policy of the Town. R1/37.

The district court had jurisdiction over the federal civil rights claims pursuant to 28 U.S.C. §1343(3) and 28 U.S.C. §1331, and pendent jurisdiction over the Florida law claims. The jury returned a verdict for Morgan and against Whitt and the Town on all claims, specifically finding that Whitt defamed Morgan and invaded his privacy,

and that Whitt and the Town violated Morgan's civil rights. App. 63-64.

The jury awarded Morgan $37,500 compensatory damages against both defendants for violation of 42 U.S.C. §1983, $1,000 compensatory damages against Whitt for defamation and/or invasion of privacy, and $9,000 punitive damages against Whitt. App. 64-65.

Motions for new trial and for judgment n.o.v. were denied, and both Whitt and the Town appealed from the District Court judgment. The United States Court of Appeals for the Eleventh Circuit reversed, App. 3, 24. That court held that Morgan had failed to establish that Whitt's actions constituted the "policy" of the Town, App. 19, that Morgan had failed to establish that Whitt's actions were taken "under color of state law," and that Morgan had failed to establish

that Whitt's statements were made with "actual malice" regarding falsity, App. 21, 23-24.

Morgan's petition for rehearing and suggestion for rehearing en banc was denied on February 27, 1989. App. 1. Morgan then timely filed this Petition.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH APPLICABLE §1983 "UNDER COLOR OF" DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS.

The court below ruled that a public official who operates in concert with a police officer under his command can be released completely from jury-imposed personal liability under §1983.[2] This is an important federal question, with broad implications, which has been decided in conflict with the decisions of

2. The jury found Whitt personally liable for $38,500 in compensatory damages, and $9,000 in punitive damages. App. 64-65.

this Court and of numerous other courts of appeals. Further, the court below has treated the whole inquiry as a matter of law rather than a question of fact, as required by this Court. See Sup. Ct. Rule 17.1(a), (c).

In the instant case, a jury decided that a Town Manager and the Police Sergeant under his command repeatedly asserted and displayed the indicia of their public offices and drew upon the perquisites of those offices both to investigate a private citizen and to defame him. Yet, the Eleventh Circuit ruled that these public officials did not act "under color of" state law.

The stark inconsistency between the rule in the instant case and the "under color of" decisions of other courts of appeals is well-illustrated by Nishiyama v. Dickson County, 814 F.2d 277 (6th

Cir. 1987) (en banc). There, the Sixth Circuit, sitting en banc, held that a sheriff and deputy had acted "under color of" state law by allowing an inmate trustee to have unsupervised use of a patrol car for personal purposes. As a result, the court ruled, they could be held liable under §1983 when the inmate used the "apparent authority" of the patrol car to stop and kill a private citizen. Similarly, the Fifth, Sixth, Seventh, Ninth and Tenth Circuits repeatedly have ruled that public officials who exhibited <u>even</u> <u>one</u> of the indicia of office involved in the instant case, e.g., official identification, were acting "under color

of" state law.[3]

Indeed, the only case relied upon by the court below, Delcambre v. Delcambre, 635 F.2d 407 (5th Cir. 1981), is clearly distinguishable from the instant case both on its facts and its procedural posture. The police chief's assault on his sister-in-law in Delcambre did not entail the threat of arrest or any other official power. He struck her during a family argument -- clearly a far cry from Whitt's defamation of a political critic, accompanied by a threat

3. See, e.g., Howard Gault Co. v. Texas Rural Legal Aid, 848 F.2d 544 (5th Cir. 1988); Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020 (1986); Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1432-33 (10th Cir. 1984), cert. denied, 474 U.S. 818 (1985); Howell v. Tanner, 650 F.2d 610 (5th Cir. 1981), cert. denied, 456 U.S. 918 (1982); Harper v. Merckle, 638 F.2d 848 (5th Cir.), cert. denied, 454 U.S. 816 (1981); Layne v. Sampley, 627 F.2d 12 (6th Cir. 1980); Davis v. Murphy, 559 F.2d 1098, 1101 (7th Cir. 1977).

to "lock his ass up." Moreover, the Delcambre court simply affirmed the trial court's post-trial findings of fact, while the court in the instant case second-guessed and reversed a jury's fact-based verdict.

The "under color of" requirement involves a "necessarily fact-bound inquiry," Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982). See also Howard Gault Co., 848 F.2d at 552 (relationship between actor and state "is a factual matter which should not be set aside unless clearly erroneous"); Howerton v. Gabica, 708 F.2d 380, 383 (9th Cir. 1983). Therefore, the Eleventh Circuit's reversal of a reasonable jury verdict which was well-supported by evidence creates a dangerous precedent.

It is undisputed that Whitt's trip was financed in part by the Town. Also,

there was more than enough evidence for a fair-minded jury to believe that Whitt, like the district attorneys who served private clients in Howard Gault Co., had access to government officials and to their information as a result of his public office. Also, Whitt's public office enabled him to order Sergeant Tice to accompany Whitt and to identify himself as a police officer when questioning people.

Indeed, a parade of witnesses testified that Whitt identified himself as Town Manager and showed his business card, and that Sergeant Tice displayed his police identification. See pp 4-7, supra. Furthermore, Whitt himself told Tice "that's why I brought you along because people tell you more when they see i.d." R5/99, 103. He also told

Tice that the Town Commission had approved the trip.

The governmental officials and other witnesses in Pennsylvania gave greater weight to Whitt's accusations about the crime of arson solely because Whitt was "clothed with the authority of the state." The severe harm to Morgan's reputation came from the listeners' logical, reasonable belief -- reinforced by specific statements from Whitt -- that only a serious and official investigation of Morgan would necessitate a visit to Pennsylvania by the Town Manager of Lake Park, Florida, and one of his police sergeants. R5/237. The court below could ignore all of this evidence only by treating the "under color of" inquiry as a question of law, despite the established precedents of other circuits and this

Court holding that it is a question of fact.

In reversing the jury's verdict based upon interrogatories, the court below ruled: "There is nothing here in the record to indicate that Whitt was clothed with the power by the Town of Lake Park to make the alleged defamatory statements about Morgan." App. 21. As this statement demonstrates, the court below wrongly merged the §1983 "policy" inquiry -- did the Town give Whitt power to act as he did (largely a legal question) -- with the much broader "under color of" inquiry -- did Whitt possess and display indicia of governmental authority (a factual inquiry).

By improperly merging these separate inquiries, the court below directly contravened this Court's established §1983 methodology. As this Court has

noted: "If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity." Griffin v. Maryland, 378 U.S. 130, 135 (1964) (emphasis added).

Nor does it matter whether or not Whitt exceeded or misused his authority. As long ago as United States v. Classic, 313 U.S. 299, 326 (1941), this Court insisted that "[m]isuse of power" can constitute action taken "under color of" state law. This principle was operationalized in Monroe v. Pape, 365 U.S. 167 (1961), which held police officers,

but not their employer city,[4] liable under §1983, even though they had no authority under state law to do what they did. The Monroe Court further noted that §1983 liability attaches to wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." Id. at 172. See also National Coll. Athl. Ass'n v. Tarkanian, 109 S.Ct. 454, 461 (1989) (reaffirming this passage from Monroe); Lugar, 457 U.S. at 929; Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985)(en banc), cert. denied, 478 U.S. 1020 (1986).

4. Though Monell v. Department of Social Services, 436 U.S. 658 (1978), reversed the entity liability portion of Monroe, it reaffirmed the portion of Monroe addressing the individual liability of the officers. Id. at 663 n.7, 690-95.

This Court's decisions have established very detailed tests to restrict the liability of local governments for the acts of their officials, but have allowed a much broader scope for the individual liability of public officials for their own unconstitutional conduct. Compare City of St. Louis v. Praprotnik, 108 S.Ct. 915 (1988), and other narrowing "policy" cases discussed in part III below, with Monroe, Lugar, and other "under color of" cases discussed in this part. See also Kentucky v. Graham, 473 U.S. 159, 165-66 (1985).

This Court has repeatedly held that even truly private citizens, who possess no actual governmental authority, can act under color of state law if they operate in concert with a police officer or other governmental official. "To act 'under color' of law does not require

that the accused be an officer of the State. It is enough that he be a willing participant in a joint activity with the State or its agents." Lugar, 457 U.S at 941-42, quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970). Adickes itself had explained that the "involvement of a state official in such a conspiracy plainly provides the state action [requirement] . . . whether or not the actions of the police were officially authorized, or lawful." 398 U.S. at 152. See also Dennis v. Sparks, 449 U.S. 24 (1980) (private parties acted under color of law when they allegedly conspired with and bribed judge to issue illegal injunction); Tower v. Glover, 467 U.S. 914, 920 (1984).

Numerous other courts of appeals have followed this approach. See, e.g., Howard Gault Co. v. Texas Rural Legal

Aid, 848 F.2d 544, 552-55 (5th Cir. 1988) (private onion growers acted "under color" of state law via "interlocking relationships" with their private attorneys -- who were also district attorneys -- sheriff, and other officials); Lusby v. T.G.&Y. Stores, Inc., 749 F.2d 1423, 1428-29 (10th Cir. 1984) (store, which hired off-duty police officer as private security guard, was under color of law because it acted in concert with police in the pursuit of its private business); Thomas S. v. Morrow, 781 F.2d 367, 377 (4th Cir.) (guardian a state actor because "'he has acted together with or has obtained significant aid from state officials....'"), cert. denied, 476 U.S. 1124 (1986).

Under these contrary decisions, even if Whitt had not (as he did) re-

peatedly identified himself as the Town Manager, Sergeant Tice's participation, pursuant to Whitt's command, provided the necessary "color of" law. The assistance and support of one of the Town's police officers must have lent a greater air of gravity and credibility to Whitt's defamatory remarks and intrusive questions. See, e.g., Booker v. Atlanta, 776 F.2d 272, 274 (11th Cir. 1985) (police officer's arrival with private repossessor gave "cachet of legality" to repossessor's actions); Lusby, 749 F.2d at 1429 (flashing of police badge, verbal identification as officer); Howerton v. Gabica, 708 F.2d 380, 382, 384 (9th Cir. 1983) (police assistance with private eviction).

If the opinion below is allowed to stand, a public official who draws upon governmental resources to injure a

private citizen will be immune from a §1983 suit in the Eleventh Circuit, while in other circuits a private citizen who does the same thing will be liable. This Court should correct this anomaly by granting certiorari to reinstate the reasonable jury verdict and district court judgment.

II. THE DECISION BELOW CONFLICTS WITH THE FIRST AND SEVENTH AMENDMENTS BY REQUIRING A CITIZEN-CRITIC TO PROVE THAT A DEFENDANT PUBLIC OFFICIAL LIED ABOUT EXTRANEOUS MATTERS WITH MALICE, AND BY REJECTING A VERDICT THAT FOUND MALICE.

By granting certiorari in this case, this Court would have the opportunity to resolve one or more of the three current conflicts among the courts of appeals which the decision below either joined or created. See Sup. Ct. R. 17.1(a). In addition, this case allows this Court to clarify First Amendment law by ruling that the constitutional

privilege given critics of the government is not available to benefit government officials who have been criticized. Thus, when a government official vilifies a citizen-critic regarding past personal matters, the citizen should not have to show actual malice.

A. The Court Below Joined a Circuit Conflict, Reflected in a Case Pending in This Court, by Second-Guessing the Jury Finding That Defendant Acted With Actual Malice.

Petitioner asks that decision on this portion of the instant Petition be deferred until this Court has issued an opinion in the case of Connaughton v. Harte Hanks Communications, Inc., 109 S.Ct. 257 (1988) (No. 88-10) (granting certiorari). At the least, the need for a grant of certiorari or remand in light of Connaughton will then be clear.

The courts of appeals are split on the issue of the proper standard that

should apply when reviewing a jury's finding of "actual malice" in constitutionalized defamation cases. See Connaughton, 842 F.2d 825, 840 n.8, 842 nn. 10-11 (6th Cir. 1988) (discussing the split). At issue is the proper application of "de novo" review of actual malice in First Amendment cases. Some courts, reading New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), to their most extreme, conduct a virtual retrial, based on the paper record, of the actual malice issue previously presented to the jury. That is, they disregard the credibility calls and rational inferences made below and fail to accord juries the deference they deserve under the Seventh Amendment. See, e.g., Tavoulareas v. Piro, 817 F.2d 762, 804-05 (D.C. Cir. 1987) (en banc)

(Wald, J., concurring) (characterizing majority analysis), cert. denied, 108 S. Ct. 200 (1988); McCoy v. Hearst Corp., 42 Cal.3d 835, 727 P.2d 711, 718, 231 Cal. Rptr. 518, 524 (1986). This standard apparently was adopted and applied by the Eleventh Circuit in the instant case.

By contrast, other courts give due deference to underlying factfindings, jury calls on credibility, and the superior position of the trial factfinder to determine demeanor and nuances of subjective intent. See, e.g., Connaughton, 842 F.2d at 840-44; McKinley v. Baden, 777 F.2d 1017, 1022 (5th Cir. 1985) ("We do not disturb [the court's] credibility choice."); Guam Fed'n of Teachers v. Ysrael, 492 F.2d 438, 441 (9th Cir.), cert. denied, 419 U.S. 872 (1974). See also Anderson v. Liberty Lobby, Inc.,

477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge....").

The decision below cannot stand if this Court affirms Connaughton or otherwise clarifies that a jury cannot be ignored after doing its job properly.[5] The court below conceded that "[i]n a general way it may be argued that [Whitt] had a purpose and intent to find whatever unsavory things he could about

5. The analysis this Court applies in Connaughton may well control here. Thus, at the least, the Eleventh Circuit should be required to review the verdict based upon this Court's refinement of its review standard.

Respondent in Connaughton has also urged this Court to find that Bose does not apply at all in the jury context. See Br. of Respondent in Connaughton, (No. 88-10) at 7-8, 47-48. Such a ruling is not necessary to afford relief to Petitioner in the instant case but would, if adopted, require reversal and remand here.

Morgan," App. 23, but still concluded that no actual malice was shown. The court did not discuss the ample record evidence from which a jury reasonably could (and did) find that Whitt knowingly lied or acted in subjective reckless disregard of the truth. For example, Whitt repeatedly accused Morgan of arson, see R6/210-11, 262, 264, without any basis for such an accusation. He also repeatedly said that he would lock Morgan up, see R6/210-11, 236, 283, again without any basis for believing that Morgan had committed any crime.

Intrusive appellate review is particularly inappropriate in this case. Petitioner Morgan is a concerned citizen who openly and honestly criticized Whitt, a public official. Whitt responded by repeatedly pillorying Morgan

with known lies and spreading false rumors, which were exacerbated by the power and influence of Whitt's public office. Whitt used his access both to the media and to government officials in Schwenksville, as well as his supervision of Sergeant Tice, to harm Morgan. A properly instructed jury -- in ruling that Whitt was liable for defamation, invasion of privacy (false light) and for a §1983 violation, App. 63-65 -- must have found that Whitt's statements were false, that he acted with actual malice, and that these lies substantially damaged Morgan's reputation. Ironically, the Eleventh Circuit then apparently applied Bose for its broadest "de novo" review, disregarding substantial contrary evidence in the record and the credibility calls the jury apparently made.

Bose, as misinterpreted by the decision below, can now be used to punish a critic of government and to protect the retaliating public official by allowing an appellate court to ignore jury findings against that official. That approach is inconsistent with Bose's stated goal of "mak[ing] sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Bose, 466 U.S. at 499, quoting New York Times, 376 U.S. at 285. The citizen-critic suing a public official should not be asked to win his case twice -- under a heightened standard of proof -- just because this Court has established broader appellate

review to protect free speech.[6]

The Eleventh Circuit's decision in this regard also joins a separate but related conflict among the circuits regarding whether Bose's "de novo" review standard should apply at all when the trial findings were in favor of free speech. See Don's Porta Signs, Inc. v. City of Clearwater, 108 S.Ct. 1280, 1280-81 (1988) (White, J., dissenting from denial of certiorari) (discussing the split). The Eleventh Circuit has adopted the position that de novo review applies on appeal even if the finding

6. To the extent the court below also can be read to have found that no falsity was established, the Eleventh Circuit has created a circuit conflict with the Fifth Circuit. In this case, the court independently decided the issue of falsity by ignoring substantial contrary evidence; by contrast, the Fifth Circuit has rejected Bose's "de novo" review over the issue of falsity. Levine v. CMP Publications, Inc., 738 F.2d 660, 668-71 (5th Cir. 1984), reh'g en banc denied, 753 F.2d 1341 (1985).

below was ultimately pro-speech or struck down governmental restrictions on speech. See Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987), cert. denied, 108 S.Ct. 1280, 1280-81 (1988).

That position, which Petitioner regards as incorrect, also has been adopted in the Fifth, Tenth, and D.C. Circuits.[7] Under that approach, utterly reasonable factfinding supporting free speech can be reversed, even though Bose's stated rationale was to allow appellate courts to protect the free

7. See Bartimo v. Horsemen's Benev. & Protective Ass'n, 771 F.2d 894, 897-98 (5th Cir. 1985), cert. denied, 475 U.S. 1119 (1986); National Ass'n of Gov't Employees v. National Fed'n of Federal Employees, 844 F.2d 216, 220 (5th Cir. 1988); Hardin v. Santa Fe Reporter, Inc., 745 F.2d 1323, 1326 (10th Cir. 1984); Tavoulareas v. Piro, 759 F.2d 90, 107 (D.C. Cir.), vacated on other grounds en banc, 763 F.2d 1472 (1985), aff'd, 817 F.2d 762, cert. denied, 108 S.Ct. 200 (1987).

speech interest at stake. The instant case reflects that inappropriate approach, by rejecting the jury's vindication of Morgan's free speech right.

By contrast, de novo review has been rejected by the Seventh and Ninth Circuits, as well as by Connecticut.[8] Petitioner contends that this is the correct approach.

This Court should grant certiorari as the instant case presents the proper vehicle to resolve this pressing and recurrent split. Here, the jury finding of actual malice has vindicated the citizen-critic Morgan. To allow the decision below to stand would be akin to

8. See Planned Parenthood Ass'n v. Chicago Transit Authority, 767 F.2d 1225, 1228-29 (7th Cir. 1985); Daily Herald Co. v. Munro, 838 F.2d 380, 384 (9th Cir. 1988); Brown v. K.N.D. Corp., 205 Conn. 8, 529 A.2d 1292, 1295 (1987). See also Note, 40 U. Miami L. Rev. 307 (1985).

permitting a court of appeals to freely review and reverse, under a false free speech label, the jury's vindication of John Peter Zenger in 1735.

B. The Eleventh Circuit's Opinion Turns the First Amendment Protection of New York Times v. Sullivan on its Head, by Applying its Citizen-Critics' Privilege in a Manner Which Shields the Public Official Being Criticized, Rather Than the Citizen.

In addition to the intrusive standard of review it applied, the court below made the fundamental error of switching the parties meant to be protected by the doctrine of New York Times Co. v. Sullivan, 376 U.S. 254 (1964). That case held a state's tort law unconstitutional under the First and Fourteenth Amendments because it conflicted with the citizen's right to challenge government officials. The decision was premised on the citizen's

role in a democracy and the ideal of robust public debate. Id. at 270; see Kalven, The New York Times Case: A Note on 'the Central Meaning of the First Amendment,' 1964 Sup. Ct. Rev. 191.

Here, by contrast, state libel law worked at trial. The jury vindicated the plaintiff citizen, who had criticized the defendant government official, by awarding moderate damages in tort. The jury necessarily found falsity and constitutional malice. App. 35-36, 52-53 (charge); id. 63-65 (verdict). On appeal, though, the public official used New York Times as a shield against this proper exercise of state tort law.

Such a mechanical application of that protection turns New York Times on its head. Surely Commissioner Sullivan could not have claimed a First Amendment privilege if, rather than availing him-

self of the courts, he had retaliated by spreading false defamatory rumors about the ministers who criticized him.

This Court should hold that the First Amendment privilege now protecting defendants (and the requirement that plaintiffs show actual malice) simply does not apply where the defendant is a public official and the plaintiff is a critical citizen. An application of state tort law which protects speech is entirely constitutional, and should be left alone.

Furthermore, in this case the Eleventh Circuit has created a rule that the public critic becomes a "general purpose public figure," thereby losing any constitutional or state law protection, simply by exercising his First Amendment right to enter a debate on public issues. See App. 22. Here,

Whitt used his public office to vilify Morgan, but when Morgan sued to redress Whitt's personal vendetta, Morgan suffered further by the court's mechanical application of New York Times to terminate both his tort claim and his civil rights claim.

The Eleventh Circuit ruled that the official, Whitt, is not liable unless citizen Morgan showed actual malice and falsity by clear and convincing evidence. Such a result will have a lasting and recurrent negative impact upon the unassailable goal of permitting breathing space to criticize the state. Compare McDowell v. Paiewonsky, 769 F.2d 942 (3d Cir. 1985) (architect suing over comments Senator made in weekly broadcast found to be public figure).

Petitioner urges this Court to consider, at the least, the question of

the scope of attack for which a public figure exposes himself, and to find in this case that the extreme defamatory remarks Whitt made were outside the boundaries of Morgan's "limited public figure" status. See Time, Inc. v. Firestone, 424 U.S. 448 (1976).

If Morgan can be considered a public figure at all, he is at most a citizen "who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974) (emphasis added). The court below made no attempt to determine whether "the alleged defamation [was] germane to the plaintiffs' participation in the controversy." Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1297 (D.C. Cir. 1980). Instead,

the court below treated Morgan as a general purpose public figure, based solely upon a citation Gertz, see App. 22. The court thereby opened Morgan to Whitt's lies on the broadest possible range of personal issues having nothing to do with Morgan's public criticism of Whitt.

If the court below had applied these contrary precedents to the undisputed facts of the instant case, there could have been but one conclusion: the "public controversy" concerned only a limited issue -- the governance of the Town of Lake Park. Whitt's baseless accusations that Morgan had committed "arson" in another state many years earlier could not possibly have been considered "germane to plaintiff's participation in the controversy." Had Commissioner Sullivan in New York Times retaliated by repeatedly and without any ba-

sis accusing the ministers of arson, surely he could not then have claimed a First Amendment defense by contending that the ministers became "public figures" as to all subjects solely by criticizing him in the press.

The court in Dowd v. Calabrese, 589 F. Supp. 1206 (D.D.C. 1984), specifically rejected such a defense in a parallel situation. There, a prosecutor sued a reporter for libel. The reporter counterclaimed, alleging that the prosecutor had violated the First Amendment by launching a investigation against him in retaliation for the reporter's critical articles. Though the prosecutor claimed he had "enormous provocation" to initiate the investigation, the court stressed the fundamental difference between the prosecutor and the reporter, viz. the prosecutor may

> be sued for deprivation of the constitutional rights even if some or all of his actions were, but for his governmental affiliation, comparable to [the reporter's]. It also follows that, if [the prosecutor] was provoked by [the reporter's] actions, his appropriate remedy was the one he ultimately chose -- a libel action; he could not lawfully use the power of his office to retaliate.

Id. at 1223 (footnote omitted) (emphasis added). Whitt has likewise used "the power of his office to retaliate." He should not be privileged to do so. Compare Pickering v. Board of Educ., 391 U.S. 563 (1968) (citizen writing letters to newspaper protected); City of Houston v. Hill, 482 U.S. 451 (1987) (citizen disagreeing with police officer not to be arrested for violating interruption ordinance). The decision below leaves the citizen-critic without even the protection of normal state libel law that existed in 1789.

III. THE DECISION BELOW DIRECTLY CONTRAVENES THIS COURT'S §1983 "POLICY" JURISPRUDENCE AND INSULATES MUNICIPALITIES FROM §1983 LIABILITY FOR THE UNCONSTITUTIONAL ACTIVITIES OF THEIR HIGH-LEVEL OFFICIALS.

The decision below wrongly insulates local governments from liability for §1983 violations, even when political retaliation against a private citizen is undertaken by their highest executive officers. Unlike recent cases decided by this Court, the instant case is not one which presents the question whether a municipality can be held liable under §1983 for an isolated tort committed by a low-level employee, such as a rookie police officer. Rather, this case involves a Town's liability for the actions of its highest executive officer -- the Town Manager. Nor is this a case where that high-level policymaking official, in a fit of passion, commits a single egregious act. Rather,

this case involves a chief executive officer, over a period of years,[9] marshalling all of the considerable governmental resources at his command to quell political criticism in the press. Moreover, the testimony before the jury demonstrated that the highest elected officials of the Town of Lake Park acquiesced in this policy, and that the Town ratified Whitt's actions by expending public funds toward the execution of the policy.

This Court has explained that "the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level." Pembaur v. Cincinnati,

9. The testimony before the jury indicated that in 1983 Whitt had "suggested" to the Town's Chief of Police to "conduct an investigation into Frank Morgan's background, dig up dirt, let him know I have this information, but not use it." R5/82 (testimony of Police Chief Riccardi).

475 U.S. 469, 480 (1986) (majority); see also id. at 483 (plurality). The decision below thus contravenes this Court's precedents clarifying the "policy" element of §1983, and frustrates the Congressional goals underlying §1983. See Sup. Ct. Rule 17.1(c).

Here, Town Manager Whitt marshalled all the trappings of his office -- including essentially plenary powers over police matters, finances, personnel decisions, and investigations -- to harass a Town citizen who had criticized government in the press. Contrary to the jury's specific finding, see App. 63-64, the court below found that Whitt's actions -- use of a police sergeant and public funds in an investigation involving allegations of criminal behavior -- did not represent the Town's official policy. App. 19.

The trial court instructed the jury:

> The Court instructs you, as a matter of law, that the Defendant Whitt possessed final authority to establish municipal policy with respect to his actions, which are the subject of this lawsuit, and that the Town of Lake Park is liable for his actions, if you find those actions to have been unlawful.

(R7/602; App. 47). This charge was based on Florida law, including the Charter of the Town of Lake Park. App. 40. But the Eleventh Circuit, after erroneously quoting Plaintiff's Proposed Instruction, see App. 66-67, ruled that instruction, which was not given, to be incorrect. App. 18-19. The actual instruction given at trial, quoted above, accords with this Court's latest pronouncement on the "policy" element:

> "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an offi-

> cial who possesses such authority, and, of course, whether an official ha[s] final policymaking authority is a question of state law."

City of St. Louis v. Praprotnik, 108 S.Ct. 915, 924 (1988) (plurality of O'Connor, White, and Scalia, JJ., and Rehnquist, C.J.) (emphasis added), quoting Pembaur v. Cincinnati, 475 U.S. 469, 483 (1986) (plurality of Brennan, White, Marshall, and Blackmun, JJ.).

The court below made no mention of the controlling Praprotnik case, which was cited in briefs and analyzed in oral argument. It is undisputed that, under Florida law and the Town Charter, Whitt's position as Town Manager made him the chief administrative and law enforcement officer of the Town. R5/30. He was in charge of all Town personnel, including the police force; this enabled Whitt to order Sergeant Tice to accom-

pany him and to show his police identification. Whitt had authority to expend Town funds for telephone calls to public officials in Pennsylvania prior to his trip and to spend Town funds for airfare to carry out the investigation of Morgan. Whitt had authority to identify himself as Town Manager. Whitt repeatedly employed and invoked these official Town powers during his investigation of Morgan.

The court below opined that "it is beyond this Court's imagination to discern" what policy "the Town could have with respect to the investigation of a private individual not in any way connected with the Town." App. 18. The court apparently meant that it could imagine no constitutionally acceptable policy of the Town to investigate its private citizens. That, however, is not

-- and cannot be -- the appropriate standard. In fact, it is easy to imagine a Town, through its Manager and the Police Department he controlled, undertaking an investigation of any citizen who actively opposed high-level officials.[10] Indeed, there was evidence before the jury that the trip to New York may have been a pretext for justifying the trip to Pennsylvania. See note 1, supra. This Court's "policy" jurisprudence has developed primarily to battle the unconstitutional policies sometimes undertaken by officials of local government. See Pembaur (county prosecutor and sheriff); Monell v. Dept. of Social Services, 436 U.S.

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[10]. In 1983, Morgan had accused city officials of acting "stupidly" with regard to its firefighters, R5/147. He also had criticized a Town Commissioner for violating the Town Charter, R5/143-44, and supported the Mayor's opponent in one campaign. R5/137-38, R6/350-62.

658 (1978) (Mayor, City Council, Chancellor, and others); Owen v. City of Independence, 445 U.S. 622 (1980) (Mayor, City Council, and City Manager).

Even an otherwise constitutionally sound policy can lead to municipal liability, if the policy "reflects deliberate indifference to the constitutional rights of its inhabitants." City of Canton v. Harris, 109 S.Ct. 1197, 1206 (1989) (inadequate police training). The instant case, however, does not involve this difficult issue. Rather, this case involves a high-level official plotting and executing a long-term campaign to silence political opposition.

The court below wrongly decided to insulate Whitt's unconstitutional behavior simply because the motive underlying the intimidation appeared to be personal

or political vindictiveness. App. 23. That is a distinction without a difference. If the city manager of a municipality ordered the police department under his command to arrest all black persons in the town, the fact that the mayor acted solely as a result of personal bigotry could not insulate the unconstitutional policy from a §1983 attack. Yet, that is precisely the result that the decision below, if allowed to stand, would require. That result would be antithetical to the intent of the 1871 Congress, which enacted the precursor of §1983, and to the "policy" decisions of this Court. See, e.g., Monell, 436 U.S. at 664-89.

Whitt's conduct also became Town "policy" by reason of the Town Commission's subsequent ratification, see Praprotnik, 108 S.Ct. at 926-27, as man-

ifested in its financial support of Whitt's venture and by the Town Commission's subsequent acceptance of his conduct without dissent when it became known. This was not a case of an anonymous public employee who, while his employer was blithely unaware, misappropriated the public resources at his disposal to silence an adversary. Instead, the Town's chief executive took action within his authority against a citizen who had criticized both him and the Town Commissioners.

The erroneous ruling of the court below reversing the jury's verdict effectively insulates municipalities from the unconstitutional acts of high-level officials. That decision puts the Eleventh Circuit far outside the accepted limits of this Court's §1983 "policy" jurisprudence.

This case did not present to the court below the difficult inquiry of "whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." City of Canton v. Harris, 109 S.Ct 1197, 1203 (1989). Here, the policy was designed to directly harm Morgan. The policy was developed and executed by the Town's highest administrative officer. After the policy had been carried out, and Morgan harmed, the Town Commission took no action against Whitt. Instead, the Town paid for some of the expenses necessary to carry out the unconstitutional policy. Faced with these facts, a properly charged jury found for plaintiff and awarded modest damages.

To allow this dangerous precedent to stand will result in the immunization

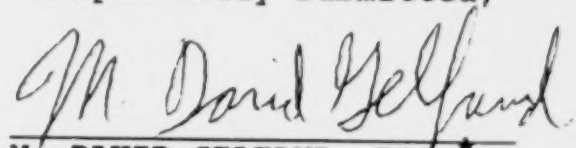
of municipalities from liability under §1983 for the unconstitutional acts of their highest officials.

CONCLUSION

Petitioner Frank Morgan urges this Court to reverse the erroneous decision of the Eleventh Circuit, and reinstate the jury verdict and district court judgment. This Court should grant the writ of certiorari to resolve the various splits among the courts of appeals, and to address the important federal questions presented by the Petition. Petitioner asks this Court to defer decision on Part II of the

Petition until after rendering your decision in Connaughton.

Respectfully submitted,

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The assistance provided by Rebecca J. King, Esq., and Dan Zimmerman, Esq., is gratefully acknowledged.